IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

FRIDAY, THE 2ND MARCH 2007 / 11TH PHALGUNA 1928

Mat.Appeal.No. 39 OF 2006()

OP.635/2002 OF FAMILY COURT, ERNAKULAM
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PETITIONER: APPELLANT/PETITIONER:

CHANDRALEKHA, AGED 20 YEARS,
D/O. CHANDRAN, KOTTAKUNNIL VEEDU,
ALAPURAM P.O., UDYOGAMANDAL, ERNAKULAM.

BY ADV. SRI.DINESH R.SHENOY

RESPONDENTS:

GOPALAKRISHNAN, AGED 35 YEARS,
S/O. AZHAKAPPANASARI, GOPALAKRISHNA SADANAM,
ERATHUKULAKADA, KALAYAPURAM,
KOTTARAKKARA, KOLLAM.

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 22/02/2007, THE COURT ON 2.3.2007, DELIVERED THE FOLLOWING:

P.R. RAMAN & S. SIRI JAGAN, JJ.

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MAT. APPEAL NO.39 OF 2006

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DATED THIS, THE 2ND DAY OF MARCH, 2007

J U D G M E N T

Raman, J.

Appellant, as the petitioner, filed O.P. 635/2002 before the Family Court, Ernakulam, under Section 13 (1a) of the Hindu Marriage Act for dissolution of the marriage and for divorce on the ground of cruelty and desertion. It was contended that the appellant and respondent got married on 13.5.2001, that the parties belong to Viswakarma community, that the appellant's father was employed abroad as a mason where the respondent was also working, that at the time of marriage, she was provided with 25 sovereigns of gold ornaments and patrimony of Rs. 60,000/-, that from the first day of marriage, the respondent started behaving in a cruel and inhuman manner and there was constant abusing and ill-treatment both mentally and physically, that whenever quarrels occurred the respondent was in the habit of creating a scene by walking out of the house, that he was suspicious of the appellant and she was abused in the presence of the family members, that the respondent appropriated the gold ornaments and

patrimony given to the appellant when he ran short of money for purchasing liquor, that the appellant's attempt to go to her parental home was also restrained, that she informed her parents about these facts and she was taken to her house for a few days, that the respondent followed her and even there, he started getting phone calls from his friends who were bad company, that he often returned fully drunk, that once she was beaten mercilessly in the presence of her parents who interfered and thereafter he deserted her and sent a lawyer notice calling upon her to live with him which was only a mala fide attempt to escape from the liability to maintain her. In those circumstances the appellant filed the original petition for dissolution of the marriage and to direct the respondent to pay Rs. 2 lakhs by way of permanent alimony besides maintenance at the rate of Rs. 1,000/- per month.

2. The respondent filed his objections denying the allegation that the appellant was provided with ornaments and patrimony and that he insulted, abused and man-handled the appellant as alleged in the original petition. According to him, all the ornaments worn by the appellant at the time of marriage were either given by him or purchased with the money sent by him. He also denied the allegation that he is a chronic alcoholic

and was constantly assaulting the appellant for no reason. He prayed for dismissal of the original petition.

3. The appellant examined herself as PW.1 and a neighbour, as PW.2. The respondent filed a proof affidavit and appeared for cross examination which was partly done, but could not be completed. Since he did not present himself for further cross examination, on 6.10.2005, an order was passed by the Family court directing to strike off his deposition. It is contended by the appellant that without appreciating the pleadings and evidence adduced in the case, the Family Court dismissed the original petition. Aggrieved thereby, the present appeal is filed.

4. The appeal was admitted, notice was ordered and service completed. But the respondent did not choose to appear in spite of notice served on him.

5. Learned counsel for the appellant contended that the Family court, while passing the impugned order, has placed reliance on the deposition of the respondent, contrary to the order passed on 6.10.2005 striking off his deposition and as such the order is bad in law. He also contended that the original petition itself was filed as early as in 2002 and the parties had been living separately and the facts and circumstances would clearly show that

the marriage has irretrievably broken down and hence a decree for divorce may be granted. He also placed reliance on the decision reported in **Ashok v. Rupa** (1997(2) KLT S.N. Case No. 21 (SC)) in support of his contention that once it is shown on the materials available on record and pleadings in the case that the marriage has irretrievably broken down the appellant is entitled to be granted a decree of divorce. It is also submitted by the counsel for the appellant that the appellant has not made any monetary claim against the respondent or any claim for maintenance and she be granted only a decree for divorce on such ground.

6. We have gone through the proceedings in the case which shows that after closing the evidence of the petitioner, the case was posted for the evidence of the respondent and since the respondent has already filed a proof affidavit, the case was posted for cross examination on several occasions. On 15.2.2005, the respondent was examined in part and the case was posted for further evidence to 2.4.2005 which was again adjourned to 17.5.2005. On that day, the respondent was absent and the cross examination was adjourned to 28.5.2005 on which day he was examined in part and the case was posted for further evidence to 27.7.2005. On 30.8.2005, the respondent was again absent and the case was posted for

further cross examination to 26.9.2005, on which day also he was absent and the case was posted to 6.10.2005 for cross examination of RW.1 as last chance. On 6.10.2005, it is recorded as follows:

> "Petitioner Present. Respondent continuously absent; Evidence of respondent closed. Evidence of respondent recorded will not be made of as cross examination not completed. Adjourned to 25.10.2005".

On 25.10.2005 also, the respondent was absent and the matter was heard and taken up for orders. It was on 28.11.2005, that the original petition was dismissed.

7. The judgment of the Family court would reveal that several attempts were made and the parties were referred for counselling and no amicable settlement could be arrived at. The evidence of PWs 1 and 2 were considered in detail and the allegation that the appellant was insulted, abused and physically man-handled even from the initial days of the marriage was found to be incorrect. The allegation of the petitioner is that there was cruelty both mentally and physically from the first day of marriage as stated in para 4 of the original petition. She has also alleged that the respondent is a drug addict and squandered away her ornaments

and the patrimony provided to her.

8. The evidence in support of the appellant's case consists of the oral testimony of herself who was examined as PW.1. During the cross examination, she has stated that she came across the respondent during 1995, that the respondent and her father happened to work abroad in the same concern and during 1997 her father returned to the native place and the respondent returned during 2001. According to the court below, this version seems to be probable in the background of Exts.B1 to B4 letters. Petitioner admitted execution of Exts.B1 to B4 letters in her evidence. It was found that the evidence of PW.1 relating to ornaments and money given to her at the time of marriage do not deserve consideration since there is no prayer made in that regard. Though she had pleaded that she was treated with cruelty on the first day of marriage itself, in her evidence as PW.1 she had stated that cruelty started since the 4th day of the marriage and the petitioner had no divulged the incident of cruelty by the respondent even to her parents on the first social visits made to their house. Therefore, the Family Court found that the allegation of cruelty is unfounded. The allegation regarding suspicion in the mind of the respondent was also found baseless. According to the court below, though the appellant stated that

she was examining her father for proving cruelty, alcoholism and drug addition of the respondent, he had not been examined. In such circumstances, it was found that the evidence of PW.1 does not give any proof to conclude that there was incessant cruelty from the respondent either mentally or physically on the petitioner. PW.2 examined in the case is a neighbour of the appellant and according to her, she does not have any knowledge regarding the respondent's alcoholism and drug addition and she did not see the respondent assaulting the appellant. The family court had also made reference to the cross examination of RW.1 who is the respondent herein. But it cannot be said that the case was dismissed placing reliance on the deposition of RW.1. It was found on analysis of the evidence of PWs 1 and 2 that the case as put forth by the appellant was not proved. Therefore, even if the respondent did not adduce any evidence in the matter, the burden being heavily on the appellant to prove the allegations in her petition and she having failed to substantiate her contentions by adducing cogent evidence, we cannot possibly find that the order passed by the family court that the appellant failed to prove the allegations contained in the petition is wrong.

9. However, that takes us to the next question as to whether the

marriage between the parties have irretrievably broken. In this regard, petitioner has produced an Inland letter written by the respondent and addressed to one Mukkamma Veerappan, which would show that the respondent was pleading innocence and he had even stated that if the appellant does not want him why he should live for her. He has also stated that the letter may not be disclosed to others and requested the addressee to send a reply. It is also a fact that despite several attempts by the Family Court, a settlement could not be reached between the parties. It is a further fact that after partly cross-examining RW.1 he did not appear before the court as a result of which cross examination could not be completed. Even before this Court, in spite of notice issued to him, he did not turn up. The totality of the circumstances and the letter Ext.P6 would clearly show that the respondent is not interested to continue his relationship with the appellant and that he no longer wishes to continue the marital relationship. Therefore, even if the divorce petition is to be dismissed on the ground that the allegation contained in the petition are not proved, no useful purpose would be served by continuing the matrimonial relationship since we find that the same has irretrievably broken down. Hence placing reliance on the decision reported in **Ashok's** case (supra) we think this is a fit case where a

decree for divorce could be granted on the ground that the marriage has irretrievably broken down. When the marriage is dead both emotionally and practically, continuance of marital alliance for namesake would amount to prolonging the agony and affliction and amount to cruelty.

10. We accordingly grant a decree for divorce on that ground. However, we make it clear that the appellant will not be entitled for any monetary benefits or alimony or any amount for maintenance from the respondent.

The Mat. appeal is allowed as above.

P.R. RAMAN,
JUDGE.

S. SIRI JAGAN,
(JUDGE)

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